Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WESLEY M. REXROAT, PRIVATE FIRST CLASS,
United States Army, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF THE UNITED STATES AIR FORCE APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
ARGUMENT	2
MILITARY COMMANDERS ARE NOT NEUTRAL AND DETACHED MAGISTRATES UNDER THE FOURTH AMENDMENT FOR PURPOSES OF A *GERSTEIN* JUDICIAL REVIEW	2
CONCLUSION	5

TABLE OF AUTHORITIES

Federal Cases:	Page
Gerstein v. Pugh, 420 U.S. 103 (1975)	*passim*
Johnson v. United States, 333 U.S. 10 (1948)	4
Kauffman v. Secretary of the Air Force, 135 U.S. App.D.C. 1, 415 F.2d 991 (1969)	3
Military Cases:	
Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976)	3
United States v. Ezell, 6 M.J. 307 (C.M.A. 1979)	3
United States v. Lopez, 35 M.J. 35 (C.M.A. 1992)	5
United States v. Malia, 6 M.J. 65 (C.M.A. 1978)	3
United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993)	2, 3
United States v. Stuckey, 10 M.J. 347 (C.M.A. 1987)	5
U.S. Statutes:	
10 U.S.C.A. § 801(9)	4
10 U.S.C.A. § 867a	1
10 U.S.C.A. § 885	4
10 U.S.C.A. § 886	4
28 U.S.C.A. § 1259	1
Miscellaneous:	
Air Force Regulation 111-1	4

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INTEREST OF THE *AMICUS CURIAE*

The United States Air Force Appellate Defense Division represents Air Force members during appeal of their court-martial convictions. We currently represent a number of members who share Petitioner's issue. Their ability to petition for a writ of certiorari will likely be foreclosed if this petition for a writ of certiorari is not granted.[1] We are vitally interested in providing the Supreme Court with information and our specialized insight to this area of military law in support of this Court granting certiorari as requested by Petitioner's brief.

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[1] 10 U.S.C.A. § 867a (West Supp. 1992); 28 U.S.C.A. § 1259 (West Supp. 1992).

ARGUMENT

MILITARY COMMANDERS ARE NOT NEUTRAL AND DETACHED MAGISTRATES UNDER THE FOURTH AMENDMENT FOR PURPOSES OF A *GERSTEIN* JUDICIAL REVIEW.

By its decision in *United States v. Rexroat*, 38 M.J. 292, (CMA 1993) (Appendix A), the United States Court of Military Appeals sought to continue the traditionally high involvement level of military commanders in both the affairs of command and the personal lives of those under their command. The historical relationship between a military commander and his subordinates has created a need for limited intrusions by a commander into the daily private lives and individual rights of his personnel. Military commanders, by nature of their position, are not neutral and detached from the law enforcement and prosecution functions on the installation. In *Rexroat*, the Court of Military Appeals judicially sanctioned allowing military commanders to review pretrial confinement probable cause determinations despite their role in enforcing the laws of command. While we agree that, in some matters essential to the proper functioning of the military and the fulfillment of its mission, commanders are properly allowed some leeway or limited level of involvement, in matters of Fourth Amendment law, the level of involvement must be proscribed in recognition of the necessity of a "neutral and detached" judicial review and probable cause determination as to confinement.

Military law and precedent after *Gerstein v. Pugh*, 420 U.S. 103 (1975) show the Court of Military Appeals' attempts to navigate between the Scylla and the Charybdis aspects of command responsibility and individual rights. In our service, like the other branches of the armed services, commanders have been accorded quasi-judicial status only with reluctance

and reservation. *See United States v. Ezell,* 6 M.J. 307 (CMA 1979) and *United States v. Malia,* 6 M.J. 65 (CMA 1978).

In *Courtney v. Williams,* 1 M.J. 267 (CMA 1976) the Court of Military Appeals noted that *Gerstein* would dictate that "procedures required by the Fourth Amendment in the civilian community must also be required in the military community, unless military necessity compelled a different rule. *Courtney* at 270.[2] The Court of Military Appeals in *Rexroat* did not analyze why the military needed a different rule, opting instead to assess the persons involved and their level of neutrality and detachment. Interestingly, the commander's level of involvement in the *Rexroat* case was not even able to be determined from the record. Thus, the court was "unable to determine if Major Williams was constitutionally qualified to perform the initial probable-cause determination required by *Gerstein* and RCM 305(d)." *Rexroat* at 16.

Thus, even though the *Rexroat* court refused to state a *per se* rule against commanders acting as magistrates in all cases, they did recognize the serious potential of prejudice by refusing to find Major Williams constitutionally qualified to perform the initial review. Despite this, the Court of Military Appeals stopped short of the constitutionally required protection of military members' rights.

Many cases coming into this Division reflect involvement by the commanders prior to the probable cause determination itself. In absence without leave (AWOL)[3] or desertion[4] cases,

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[2] *Courtney* also indicates that "the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Courtney* at 270, *citing Kauffman v. Secretary of the Air Force,* 135 U.S. App.D.C. 1, 415 F.2d 991 (1969).

[3] 10 U.S.C.A. § 886 (West Supp. 1992).

[4] 10 U.S.C.A. § 885 (West Supp. 1992).

which make up the majority of the pretrial confinement issues in our experience, the commanders are intimately involved in searching for the member and investigating and acting in concert with the police. They are almost always the formal accuser[5] of the charges filed against the member, and take adverse actions prior to or immediately upon apprehension to discipline or investigate other offenses which precipitated the absence in the first place.[6] They interact and cooperate frequently with the law enforcement officials, contrary to the mandate in *Gerstein,* 420 U.S. at 112, 118. Air Force practice allows the member's commander to make the initial determination of probable cause as well as to review his decision within 72 hours and only requires that a "military magistrate" make some sort of decision and report within 7 days. *See* Air Force Regulation 111-1 (C2), Chapter 4, paras. 4-1 and 4-2. 12 July 1989. (Appendix B). Unlike the Army, Air Force practice does not require that judge advocates perform the magistrate duties.

As noted in *Gerstein,* the procedure adopted to comply with the Fourth Amendment "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." 420 U.S. at 126 (1974) (footnotes omitted).

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[5] 10 U.S.C.A. § 801(9) (West Supp. 1992) defines an Accuser as "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused."

[6] *Gerstein* noted that the protection of the Fourth Amendment is that it requires that the inferences which reasonable men draw from evidence be drawn by a neutral and detached magistrate rather than by those "engaged in ferreting out crime." 420 U.S. at 113, 114, *quoting Johnson v. United States,* 333 U.S. 10, 13-14, (1948)

Commanders are not judicial officers. They have interests in maintaining good order and discipline in their command and in the service in general which makes them too partial and involved to fulfill the requirements of a neutral and detached magistrate. *See United States v. Stuckey,* 10 M.J. 347, 361 (CMA 1981) and *United States v. Lopez,* 35 M.J. 35, 51-52 (CMA 1992) (Wiss, J. concurring in the result). The potential for abuse by commanders is too great. The potential for military members languishing in jail awaiting trial and resolution of these issues on appeal render the stakes for the imprisoned too important to allow this case-by-case approach to pretrial confinement problems to be acceptable any longer under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Military Appeals should be reversed allowing the military member to be assured of receiving a probable cause determination prior to and immediately after confinement by a neutral and detached individual, not a commander.

Respectfully submitted,

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